



October 22, 2001

Mr. Kelley McCormick
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2001-4776

Dear Mr. McCormick:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153705.

The Office of the Governor (the "governor") received a request for the application of a named individual "to serve on the Texas Department of Health board of directors and any related material. . . ." You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your claim that section 552.107 excepts the information in Exhibit A from public disclosure. Section 552.107(1) of the Government Code excepts information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]" While section 552.107(1) appears to apply to information within rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, this office has determined that section 552.107 cannot be applied as broadly as written to information in the possession of an attorney for a governmental body. Open Records Decision No. 574 (1990). Section 552.107(1) was found to protect only the attorney's communication of legal advice or opinion to the client and communications from a client to an attorney where those communications are made in confidence and in furtherance of the attorney rendering professional legal service to the governmental body. *Id.* at 5. Moreover, section 552.107(1) does not except purely factual

information from disclosure. *Id.* We determine the applicability of section 552.107(1) on a case-by-case basis. You state that the information contained in Exhibit B consists of "a legal memorandum prepared by legal counsel for appointments and policy staff within the Office of the Governor." Upon review of your argument and the submitted information in Exhibit A, we find that the information at issue reflects an attorney's legal advice or opinions. Therefore, the governor may withhold the information in Exhibit A from public disclosure under section 552.107.¹

Next, we address your argument regarding public disclosure of criminal history information. Criminal history record information ("CHRI") is confidential and not subject to disclosure. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 411.082 of the Government Code defines CHRI as follows:

(2) . . . information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions. The term does not include:

. . .

(B) driving record information maintained by the department under Subchapter C, Chapter 521, Transportation Code.

Gov't Code §411.082(2). Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming that you have CHRI about the named individual in your possession and it falls within the ambit of these state and federal regulations, you must withhold the CHRI from the requestor.

¹As section 552.107 is dispositive, we do not address your section 552.111 claim for the information in Exhibit A.

You argue that section 552.130 of the Government Code will except a portion of the submitted information in Exhibit B from public disclosure. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license number under section 552.130.

You also raise chapters 521 and 730 of the Transportation Code. Section 730.004 of the Transportation Code prohibits the release of "personal information" about any person obtained in connection with a motor vehicle record by an agency that maintains or compiles motor vehicle records, except under certain circumstances not present here.² However, the governor is not an "agency" of the state for purposes of section 730.004. *See* Transp. Code § 730.003(1) (defining "agency"). Section 521.052 regulates disclosure of individual information by the Department of Public Safety. Accordingly, we conclude that chapters 521 and 730 of the Transportation Code are not applicable in this case.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to

²"Personal information" is defined as including an individual's social security number, driver identification number, name, address, and telephone number. *See* Transp. Code § 730.003(6).

the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We find that the remaining portion of the information in Exhibit B may not be withheld from disclosure under section 552.101 in conjunction with common law privacy.

In summary, the submitted information in Exhibit A may be withheld from disclosure under section 552.107(1). To the extent that the submitted information contains CHRI about the named individual, the governor must withhold the CHRI from the requestor. The Texas driver's license number contained in Exhibit B must be withheld pursuant to section 552.130. The remainder of the submitted information in Exhibit B must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 153705

Enc: Submitted documents

c: Mr. W. Gardner Selby
Austin Bureau
San Antonio Express-News
1005 Congress, Suite 430
Austin, Texas 78701
(w/o enclosures)